

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MICHELLE J. KINNUCAN,

Plaintiff,

v.

NATIONAL SECURITY AGENCY;  
CENTRAL INTELLIGENCE  
AGENCY; DEFENSE  
INTELLIGENCE AGENCY; and  
DEPARTMENT OF DEFENSE,

Defendants.

CASE NO. C20-1309 MJP

ADDITIONAL ORDER ON CROSS-  
MOTIONS FOR SUMMARY  
JUDGMENT

The Court previously issued an Order on the Parties' Cross-Motions for Summary Judgment. (Dkt. No. 40.) The Court reserved ruling on Plaintiff's Freedom of Information Act (FOIA) claims and ordered in camera review. The Court has now completed the in camera review. The Court finds that Defendants have not provided an adequate Vaughn index or explanation of whether they properly segregated non-exempt information. The Court ORDERS Defendants to supplement the Vaughn index and supporting declarations to cure the defect

1 identified in this Order. And the Court ORDERS further briefing upon completion of these  
2 submissions. The Court will render its final decision as to the FOIA claims once the additional  
3 briefing is completed.

#### 4 **BACKGROUND**

5 Plaintiff Michelle Kinnucan is a researcher, writer, advocate, and veteran who is suing  
6 the National Security Agency (NSA), the Central Intelligence Agency (CIA), the Defense  
7 Intelligence Agency (DIA), and the Department of Defense (DOD) for violating her rights under  
8 FOIA, 5 U.S.C. § 552. Plaintiff seeks records relating to a 1967 attack by Israeli forces on a U.S.  
9 naval intelligence ship in international waters that left 34 dead and 173 wounded during the Six-  
10 Day War involving Israel, Egypt, Syria, Lebanon, and Iraq. (Amended Complaint ¶¶ 1–5 (Dkt.  
11 No. 17).) In response to Plaintiff’s FOIA request, the CIA produced twelve redacted documents  
12 and identified three additional documents that it withheld in full. (See Declaration of Vanna  
13 Blaine (Dkt. No. 30).) The CIA claims that the withheld information falls within Exemption 1  
14 and 3 under FOIA. The NSA also claims that portions of one document are properly withheld  
15 under Exemptions 1 and 3. (See Declaration of Linda M. Kiyosaki (Dkt. No. 29).)

16 The Court issued an Order on the Parties’ Cross-Motions for Summary Judgment. (Dkt.  
17 No. 40.) In that Order, the Court disposed of Plaintiff’s claim as to a House Appropriations  
18 Report and her claim for declaratory relief. (Id.) But the Court reserved ruling on whether the  
19 CIA and NSA properly withheld or redacted information from fifteen documents consistent with  
20 FOIA. The Court ordered the documents be produced in camera and after lengthy delays related  
21 to obtaining the necessary security clearance for one the Court’s law clerks, the Court has now  
22 completed its review.

## ANALYSIS

### A. Legal Standards

FOIA permits an agency to exempt records from disclosure on nine enumerated grounds. 5 U.S.C. § 552(b)(1)–(9). These exemptions reflect the recognition that legitimate governmental and private interests could be harmed by the release of certain types of information. Am. Civ. Liberties Union of N. Cal. v. U.S. Dep’t of Just., 880 F.3d 473, 483 (9th Cir. 2018). But the exemptions are narrowly construed and the agency has the burden of justifying withholding under any of them. Id. That is because “[g]overnment transparency is critical to maintaining a functional democratic polity, where the people have the information needed to check public corruption, hold government leaders accountable, and elect leaders who will carry out their preferred policies.” Hamdan v. U.S. Dep’t of Just., 797 F.3d 759, 769–70 (9th Cir. 2015)

The Court employs de novo review of agency compliance with FOIA. 5 U.S.C. § 552(a)(4)(B); Animal Legal Def. Fund v. U.S. Food & Drug Admin., 836 F.3d 987, 990 (9th Cir. 2016) (en banc). “The burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not agency records or have not been improperly withheld.” See U.S. Dep’t of Just. v. Tax Analysts, 492 U.S. 136, 143 n.3 (1989) (citation and quotation omitted). And ultimately the Court “has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B).

To ensure the FOIA exemptions have been properly asserted, the Court engages in a two-step review process. First the Court reviews whether the agency has given “an adequate factual basis” to support withholding under FOIA. Hamdan, 797 F.3d at 769. Second, the Court determines whether FOIA’s exemptions correctly apply. Id. In making these determinations, the

1 Court may also review withheld records in camera. 5 U.S.C. § 552(a)(4)(B); see Am. Civ.  
 2 Liberties, 880 F.3d at 485. But because in camera review “does not permit effective advocacy  
 3 . . . [i]n camera review of the withheld documents by the court is not an acceptable substitute for  
 4 an adequate Vaughn index.” Wiener v. F.B.I., 943 F.2d 972, 979 (9th Cir. 1991).

5 A critical part of the Court’s review is to determine whether the agency’s “indices and  
 6 supporting declarations constitute a sufficient Vaughn index. . . .” Hamdan, 797 F.3d at 769  
 7 (quoting Citizens Comm’n on Human Rights v. FDA, 45 F.3d 1325, 1328 (9th Cir. 1995)). “A  
 8 Vaughn index is a submission that ‘identif[ies] the documents withheld, the FOIA exemptions  
 9 claimed, and [contains] a particularized explanation of why each document falls within the  
 10 claimed exemption.’” Transgender L. Ctr. v. Immigr. & Customs Enf’t, 46 F.4th 771, 781 (9th  
 11 Cir. 2022) (quoting Lahr v. Nat’l Transp. Safety Bd., 569 F.3d 964, 989 (9th Cir. 2009) (internal  
 12 citation omitted)). “Where the government invokes FOIA exemptions in cases involving national  
 13 security issues, we are ‘required to accord substantial weight to [the agency’s] affidavits.’”  
 14 Hamdan, 797 F.3d at 769 (quoting Hunt v. CIA, 981 F.2d 1116, 1119 (9th Cir. 1992) (quotation  
 15 omitted)). “Those affidavits ‘must describe the justifications for nondisclosure with reasonably  
 16 specific detail, demonstrate that the information withheld logically falls within the claimed  
 17 exemptions, and show that the justifications are not controverted by contrary evidence in the  
 18 record or by evidence of [agency] bad faith.’” Id. (quoting Hunt, 981 F.2d at 1119). “Specificity  
 19 is the defining requirement of the Vaughn index.” Transgender L. Ctr., 46 F.4th at 781 (quoting  
 20 Wiener v. FBI, 943 F.2d 972, 979 (9th Cir. 1991)). “For this reason, the agency ‘may not  
 21 respond with boilerplate or conclusory statements.’” Id. (quoting Shannahan v. IRS, 672 F.3d  
 22 1142, 1148 (9th Cir. 2012)). Rather the “agency must ‘disclose[ ] as much information as  
 23 possible without thwarting the [claimed] exemption’s purpose.’” Id. at 782 (quoting Wiener, 943  
 24

1 F.2d at 979). “[T]he Government ‘must bear in mind that the purpose of the index is not merely  
 2 to inform the requester of the agency's conclusion that a particular document is exempt from  
 3 disclosure . . . but to afford the requester an opportunity to intelligently advocate release of the  
 4 withheld documents and to afford the court an opportunity to intelligently judge the contest.’” Id.  
 5 at 782 (quoting Wiener, 943 F.2d at 979).

6 FOIA also requires that any “reasonably segregable portion of a record shall be provided  
 7 to any person requesting such record after deletion of the portions which are exempt under this  
 8 subsection.” 5 U.S.C. § 552(b). “It is reversible error for the district court to simply approve the  
 9 withholding of an entire document without entering a finding on segregability, or the lack  
 10 thereof, with respect to that document.” Hamdan, 797 F.3d at 779. “This requirement dovetails  
 11 with the principle that a district court errs when it grants summary judgment where the agency  
 12 ‘did not provide [plaintiff] or the district court with specific enough information to determine  
 13 whether the [agency] had properly segregated and disclosed factual portions of those documents  
 14 that the [agency] claimed were exempt under the deliberative process privilege.’” Transgender L.  
 15 Ctr., 46 F.4th at 785–86 (quoting Pac. Fisheries, Inc. v. United States, 539 F.3d 1143, 1149 (9th  
 16 Cir. 2008)).

#### 17 **B. The Sufficiency of Defendants’ FOIA Exemption and Segregability Assertions**

18 The CIA and NSA have invoked FOIA Exemptions 1 and 3 (5 U.S.C. § 552(b)(1) and  
 19 (b)(3), respectively) as the basis to redact portions of twelve documents and to withhold three  
 20 other documents in full that are responsive to Plaintiff’s FOIA request.<sup>1</sup> (See Order on Cross-

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21  
 22 <sup>1</sup> The Court has already ruled that certain materials withheld under Section 552(b)(6)’s  
 23 protections on personal information is acceptable, particularly given Plaintiff’s failure to  
 24 articulate any public-interest rationale for requiring the disclosure of names. (See Order on  
 Cross-Motions at 18.) As such, the Court does not address further Defendants’ invocation of  
 Exemption 6.

Motions at 13-17.) The CIA claims certain records are exempt under Exemption 1 to protect “classified intelligence methods and sources” whose release is reasonably expected to harm national security. (See Blaine Decl. ¶¶ 20- 45 and Ex. H (Vaughn index).) It also claims that Exemption 3 applies to portions of each document that would reveal information that the CIA may not disclose by statute. (Blaine Decl. ¶¶ 46–47.) The NSA also claims that portions of document 8 must be withheld under Exemptions 1 and 3. (Kiyosaki Decl. ¶¶ 30-43.) The Court first reviews whether the CIA and NSA have satisfied their burden to prove that either or both exemptions applies and then turns to the question of segregability.

### **1. Exemption 1**

Under Exemption 1, an agency does not have to disclose information that is:

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.

5 U.S.C. § 552(b)(1). As the Court previously explained, “[t]he issue here is whether the information withheld remains ‘in fact properly classified.’” (Order on Cross-Motions at 13 (quoting 5 U.S.C. § 552(b)(1)(B)).) The CIA has asserted that the documents and information are correctly withheld as being classified under Executive Order 13526 because disclosure could reasonably be expected to cause damage to national security. (*Id.* (citing Blaine Decl. ¶ 37).) For classification to be proper under EO 13526, two elements are required: (1) disclosure must reasonably be expected to result in damage to national security and (2) “the original classification authority is able to identify or describe the damage.” Exec. Order 13526 § 1.2(a).

When the agency invokes Exemption 1 as to intelligence sources and methods, it “must provide the court and the FOIA requester with information sufficient to determine whether the source was truly a confidential one and why disclosure of the withheld information would lead to exposure of the source.” Wiener, 943 F.2d at 980. “To justify an Exemption 1 claim, the Vaughn

1 index must provide (to the extent permitted by national security needs) sufficient information to  
2 enable the requester to contest the withholding agency's conclusion that disclosure will result in  
3 damage to the nation's security." Id. Conditional and boilerplate assertions are insufficient  
4 because they lack adequate specificity to permit the requester a fair opportunity to challenge the  
5 agency's conclusion. See id at 979. In Wiener, for example, the court held that the Vaughn  
6 "index fail[ed] to tie the FBI's general concern about disclosure of confidential sources to the  
7 facts of this case." Id. at 981 (concerning information that was over 20 years old). But  
8 "[u]ltimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears  
9 logical or plausible." Hamdan, 797 F.3d at 774 (citation and quotation omitted). And the Court  
10 must "give considerable deference to agency affidavits made in apparent good faith where the  
11 affidavits reasonably describe the justifications for nondisclosure and show that the content  
12 withheld falls within one of FOIA's exemptions." Id. at 772.

13       Having completed in camera review of the documents, the Court has been able to assess  
14 the justifications advanced by the CIA and NSA in the Vaughn index and supporting  
15 declarations. But the Court is aware of the Ninth Circuit's admonishment that in camera review  
16 "is not an acceptable substitute for an adequate Vaughn index." Wiener, 943 F.2d at 979. The  
17 Court therefore does not rely on its in camera review to serve as a substitute for the Vaughn  
18 index. The Court's decision in this Order turns on its review of the Vaughn index, the supporting  
19 declarations, and the redacted copies of the records that have been produced to Plaintiff. To the  
20 extent the Court references its in camera review, it does so merely to provide Defendants specific  
21 instances where the Court believes the Vaughn index and supporting declarations particularly fall  
22 short.

1 In the following subsections, the Court reviews its two-part analysis of the Exemption 1  
 2 claims. First, the Court assesses whether the supporting declarations and Vaughn index  
 3 sufficiently identify the information withheld as concerning intelligence methods and sources,  
 4 covert agency facilities, and/or the NSA's intelligence activities and capabilities. Second, the  
 5 Court examines whether the CIA and NSA have given sufficient justification to conclude that  
 6 revelation of the materials is reasonably expected to harm the national security.

7 **a. Step 1: Sufficient Identification of Withheld Material**

8 As to Document 1 (C01283097), the Court finds that the redacted information withheld  
 9 under Exemption 1 on page three has been sufficiently identified by the CIA in the Vaughn index  
 10 to concern intelligence sources and methods. Blaine's declaration and the Vaughn index identify  
 11 this information as concerning intelligence sources and methods. (Blaine Decl. ¶¶ 37-38, 42;  
 12 Vaughn Index, Entry No. 1.) This claim is narrowly asserted as to just one limited portion of the  
 13 final page of the document. The assertion appears both logical and plausible, particularly when  
 14 applying the deference owed to the CIA's declarant. See Hamdan, 797 F.3d at 772, 774. The  
 15 Court therefore finds the CIA has adequately identified the redacted information as concerning  
 16 intelligence sources and methods covered by Exemption 1.

17 As to Documents 2 (C06883306), Document 3 (C00431696), Document 4 (C00431695),  
 18 Document 5 (C02412716), Document 6 (C06883307), Document 8 (C03030912), and Document  
 19 9 (C00431707) the Court finds that Blaine and the Vaughn index fail to adequately describe how  
 20 the redacted information falls within Exemption 1. There are multiple paragraphs in each  
 21 document identified as being subject to Exemption 1. But the Vaughn index provides only the  
 22 following boilerplate explanation for all of the redactions in each document: "Exemption (b)(1)  
 23 was asserted to protect classified intelligence methods and sources." (Vaughn Index, Entry Nos.  
 24 2, 3, 4, 5, 6, 8, and 9.) Blaine's declaration adds some additional information, but that

1 information is not document- or redaction-specific. First, like the Vaughn index, Blaine states  
2 that “[i]ntelligence sources, methods, and activities properly withheld under Exemption (b)(1)  
3 are contained in” each document, listing the relevant page ranges. (Blaine Decl. ¶ 42.) Blaine  
4 adds additional color about the documents, but she speaks about them as a collection, without  
5 any differentiation that might allow the reader to tie her claim to a specific document or redacted  
6 portion of the document. (Blaine Decl. ¶¶ 38-41.) For example, she states that “[m]ost of the  
7 documents at issue contain information concerning CIA intelligence sources and methods. . . .”  
8 (Blaine Decl. ¶ 39.) Neither the Court nor Plaintiff can reasonably use this statement to identify  
9 what specific portions of the documents actually contain information about CIA intelligence  
10 sources and methods. While the Court gives deference to Blaine’s attestation, it remains too  
11 vague to intelligibly identify those portions of Documents 2, 3, 4, 5, 6, 8, and 9 that might  
12 concern intelligence sources and materials. The CIA’s Vaughn index and Blaine’s declaration  
13 diverge from those found adequate in Hamdan where the FBI identified how a specific document  
14 “reflected a particular vantage point from which the source of the intelligence might be  
15 identified” and that groups of documents reflected “intelligence activities information gathered  
16 on a specific individual or organization and that disclosure would reveal the means used to  
17 gather the intelligence and the extent of the FBI’s knowledge of a specific target during a  
18 specific period in time.” Hamdan, 797 F.3d at 774–75. Here, the CIA advances boilerplate  
19 assertions in the Vaughn index and only generalized statements about the contents of groups of  
20 documents rather than specific assertions as to each redacted portion of these documents. This  
21 falls short of the CIA’s burden to show the contents of these documents fall within Exemption 1.  
22 See Wiener, 943 F.2d at 979 (finding similar boilerplate assertions insufficient).

1 The Court's in camera review also confirms that the CIA's descriptions are too vague to  
 2 allow the Court to identify what is or is not an intelligence method or source in the redacted  
 3 sections. For example, despite the information in the Vaughn index, the Blaine and Kiyosaki  
 4 Declarations the Court could find no evidence that the following redacted information concerns  
 5 intelligence methods or sources:

6 Document 2: (1) page 2 at ¶ 3;

7 Document 3: (1) page 2 at ¶ 2 (words 4, 6, 15, 18 to the end); (2) page 2 at ¶ 3; (3) page  
 8 3 at ¶ 10; and (4) page 3-4 at ¶ 12;

9 Document 4: (1) page 2 at ¶ 3;

10 Document 6: (1) page 2 at the last sentence of paragraph ¶ 5;

11 Document 8: (1) page 3 at the first redaction block and the first two words of the second  
 12 redaction block; (2) page 5 at ¶¶ 1, 3, and 4; (3) page 5 at the first sentence  
 13 of the last paragraph; (4) page 6 at ¶¶ 2, 3 and 4; (4) page 6 at the first  
 sentence and words 1-7 of second sentence in ¶ 5; (5) page 7 at ¶¶ 1, 2, 3,  
 and 5; (6) page 7 at ¶ 4 except as to the last sentence; (7) page 8 in full; (8)  
 page 10, in full except for first sentence and header of ¶ 1; (9) page 11 in  
 full; and (10) page 12 at ¶¶ 1-3; and

14 Document 9: (1) page 4 at ¶ 9 except as to the last sentence; and (2) page 4-5 at ¶ 10.

15 The Court also finds that the NSA has inadequately identified materials subject to  
 16 Exemption 1 in Document 8. Kiyosaki claims that Document 8 contains “specific details about  
 17 NSA intelligence activities and capabilities” and “details about NSA intelligence reporting  
 18 derived from SIGINT and associated analysis and explanation.” (Kiyosaki Decl. ¶ 36.) She  
 19 further explains that this information concerns “intelligence activities (including covert action),  
 20 intelligence sources and methods, or cryptology.” (Kiyosaki Decl. ¶ 33 (citing Section 1.4(c) of  
 21 E.O. 13526).) But Document 8 contains fourteen pages, with redactions associated with  
 22 Exemption 1 on eleven pages. While Kiyosaki's explanations are perhaps more specific than  
 23 Blaine's, they do not allow a meaningful assessment of whether each piece of redacted  
 24

1 information falls within these broad categories. The declaration could have offered specific  
2 insights as to each redacted section of information, but does not. That hampers the Court’s ability  
3 to judge this dispute. See Transgender L. Ctr., 46 F.4th at 782. And the Court’s in camera review  
4 confirms that Kiyosaki’s declaration lacks the necessary specificity to confirm—even with  
5 deference—that Exemption 1 applies to each piece of redacted information.

6 As to the three documents withheld in full—Document 11 (C031711947), Document 12  
7 (C02901016), and Document 13 (C03006070)—the Court similarly finds that the CIA fails to  
8 meet its burden. As with Documents 2, 3, 4, 5, 6, 8, and 9, Blaine’s declaration provides  
9 inadequate information to know whether or not the entirety of each document details intelligence  
10 sources and methods. The Vaughn index repeats the boilerplate statement that “Exemption (b)(1)  
11 was asserted to protect classified intelligence methods and sources.” (Vaughn Index, Entry Nos.  
12 11-13.) But without more specificity, the Court cannot assess whether all 173 withheld pages  
13 plausibly identify intelligence methods and sources. Additionally, Blaine claims that Documents  
14 11, 12, and 13 “each contain[s] details related to the locations of covert CIA installations and  
15 locations.” (Blaine Decl. ¶ 44.) But these documents total 173 pages and there is no explanation  
16 from Blaine or the Vaughn index that all pages contain references to CIA installations or  
17 locations. Indeed, the Vaughn index makes no reference to covert locations. Even though the  
18 Court applies deference to the assertions, they are not specific enough to merit a finding that  
19 Exemption 1 applies to all of the information in these three documents. The Court’s in camera  
20 review also confirmed that the justification advanced lacks sufficient specificity to conclude that  
21 all pages of these documents reflect intelligence sources and methods or covert locations. The  
22 Court finds that CIA has failed to meet its burden to show how all of the information in these  
23 documents falls within Exemption 1.  
24

**b. Step 2: Reasonable Expectation of Harm to National Security**

The Court also finds the CIA and NSA have failed to identify with sufficient care and detail how the revelation of the withheld and redacted information from 1967 and 1978 would reasonably be expected to result in current damage to national security. See Exec. Order 13526 § 1.2(a). The Court has examined the CIA’s and NSA’s declarations and Vaughn index to determine whether the justifications for nondisclosure are provided with “reasonably specific detail [to] demonstrate that the information withheld logically falls within the claimed exemptions. . . .” Transgender L. Ctr., 46 F.4th at 781 (quotation and citation omitted). The Court acknowledges that the CIA and NSA’s justification will withstand scrutiny “if it appears logical or plausible.” Hamdan, 797 F.3d at 774 (citation and quotation omitted). But even applying the deference owed on matters of national security, the Court remains unconvinced that revelation of all of the withheld information is reasonably expected to harm the national security.

The CIA fails to provide a logical explanation as to why the redacted and withheld information would reasonably be expected to harm national security if revealed. First, Blaine does not attempt to make a showing of harm specific to each document or its contents. Instead, Blaine speaks in generalities about the risk of disclosure of information about intelligence methods and sources, and the location of covert facilities. (Blaine Decl. ¶¶ 39-40, 44.) That is problematic because it does not allow the Court to measure the logic or plausibility of the assertions as to each document, particularly for lengthy documents. It also falls short of the agency’s burden to “make an effort to tailor the explanation for classification to the specific document withheld.” Hamdan, 797 F.3d at 773.

Second, Blaine fails to make a logical or plausible explanation as to why the revelation of information from 1967 and 1978 would be reasonably likely to harm national security. Blaine contends that “[e]ven small details about CIA’s intelligence activities, or sources or capabilities

1 in the 1960s could provide helpful information to our adversaries today” because “[i]t would  
 2 allow them to build a better understanding of the sources or partners the CIA worked with (and  
 3 when), and what information the CIA had the capability of gathering at the time.” (Blaine Decl. ¶  
 4 41.) Even applying substantial weight to this assertion, the Court finds missing any statement of  
 5 why an adversary’s understanding of the CIA’s methods or sources from the 1960s would or  
 6 could allow them to interfere with the CIA’s current methods or sources of intelligence  
 7 gathering. See Hamdan, 797 F.3d at 769 (requiring “substantial weight” to be applied to the  
 8 declaration). Even applying deference, the Court cannot paper over the logical gap in the CIA’s  
 9 position.

10 Third, Blaine asserts that “many intelligence sources and methods remain viable for  
 11 many years, and the harms from disclosure do not become attenuated over time.” (Blaine Decl. ¶  
 12 41.) But Blaine nowhere asserts that the withheld information concerns any currently viable  
 13 sources or methods of intelligence gathering that might support her assertion. Blaine runs into a  
 14 similar pitfall when describing covert agency facilities. Although she claims Documents 11, 12,  
 15 and 13 contain details about covert CIA facilities and locations and that such revelations could  
 16 be harmful, she nowhere states whether any of these locations or facilities described fifty-five  
 17 years ago are currently in use or might be expected to be in future use. In sum, the Court is  
 18 unconvinced that the CIA has met its burden as to all of the withheld and redacted documents  
 19 particularly given the lengthy passage of time.

20 The NSA, too, falls short of meeting its burden as to Document 8. Kiyosaki fails to  
 21 advance a logical or plausible explanation as to why revelation of information from 1967 would  
 22 harm national security. Kiyosaki asserts that revealing Document 8’s information about the  
 23 NSA’s “intelligence activities and capabilities” would “thereby affect the ability of NSA to  
 24

1 counter threats to the national security of the United States.” (Kiyosaki Decl. ¶ 35.) Kiyosaki  
2 makes no mention of why information from 1967 would make the NSA presently unable to  
3 counter current or future threats. This undermines the logic of her position. Kiyosaki also reports  
4 that because the information contains “details about NSA’s intelligence reporting derived from  
5 SIGINT and associated analysis or explanation” its disclosure would harm national security  
6 “given the insights it provides.” (*Id.*) But, again, Kiyosaki does not acknowledge the age of the  
7 information or explain why its specific revelation might disrupt present NSA intelligence efforts.  
8 This is insufficient. *See Hamdan*, 797 F.3d at 773. Kiyosaki also posits that “[i]f targets were  
9 aware of NSA’s capabilities against them, they would likely change their methods to evade  
10 collection, which could undermine NSA’s entire mission.” (Kiyosaki Decl. ¶ 36.) But this kind  
11 of conditional explanation falls short, as the Ninth Circuit concluded in *Wiener*, 943 F.2d at 979.  
12 *See Hamdan*, 797 F.3d at 774. And Kiyosaki fails to state whether there are any present targets  
13 identified in Document 8 that might possibly change their methods to evade collection if the  
14 document was revealed showing activities from 1967 and before. Kiyosaki’s declaration also  
15 relies on a presumption of harm to national security, which is improper because the NSA bears  
16 that burden. *See Am. Civ. Liberties*, 880 F.3d at 483. For example, Kiyosaki states the withheld  
17 information consist of specific details about NSA intelligence activities and capabilities, which  
18 plainly cannot be released to the public without exceptionally grave damage to national  
19 security.” (Kiyosaki Decl. ¶ 36.) While the danger may be “plain” to Kiyosaki, the NSA still  
20 bears the burden to show that this conclusion is logical or plausible. The Court finds this circular  
21 reasoning inadequate.

22 \* \* \*

The Court briefly summarizes its conclusions. First, although the CIA has provided sufficient explanation of why Document 1 refers to materials covered by Exemption 1, it has failed to identify why the other information in Documents 2, 3, 4, 5, 6, 8, 9, 11, 12, and 13 fits within Exemption 1. Similarly, the NSA has not convinced the Court that Exemption 1 applies to Document 8. Second, as to all of these documents, both the CIA and NSA have not offered a plausible or logical explanation for why the revelation of this information is reasonably expected to harm the national security. The Court notes that the Vaughn index, in particular, remains threadbare and full of unhelpful boilerplate that does not allow the Court to “intelligently judge” the agencies’ claims as to Exemption 1. See Transgender L. Ctr., 46 F.4th at 782 (citation and quotation omitted). The supporting declarations do not fill that gap, given their lack of specificity, clarity, and logic.

## **2. Exemption 3**

The CIA and NSA invoke Exemption 3 to protect certain information from disclosure. “There is a two-step inquiry in deciding Exemption 3 questions.” Hamdan, 797 F.3d at 776. “We ask first whether the statute identified by the agency is a statute of exemption within the meaning of Exemption 3, and then whether the withheld records satisfy the criteria of the exemption statute.” Id. (citation omitted).

As to the first step, the CIA and NSA identify Section 102(A)(i)(1) of the National Security Act, 50 U.S.C. § 3024, and Section 6 of the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. § 3507, as statutory bases for this exemption. (Blaine Decl. ¶ 47; Kiyosaki Decl. ¶ 41.) The National Security Act provides that the Director of National Intelligence (DNI) “shall protect intelligence sources and methods from unauthorized disclosure.” 50 U.S.C. § 3024. The DNI is authorized to protect CIA methods. The NSA has also identified Section 6 of the

1 National Security Agency Act of 1959, 50 U.S.C. § 3605, as the basis for withholding. This  
 2 statute exempts the NSA from “the disclosure of the organization or any function of the National  
 3 Security Agency, or any information with respect to the activities thereof, or of the names, titles,  
 4 salaries, or number of the persons employed by such agency.” 50 U.S.C. § 3605(a).

5 As to the second step, the National Security Act “provides the Director [of National  
 6 Intelligence] with ‘very broad authority to protect all sources of intelligence information from  
 7 disclosure.’” Berman v. C.I.A., 501 F.3d 1136, 1140 (9th Cir. 2007) (quoting C.I.A. v. Sims,  
 8 471 U.S. 159, 168–69 (1985)). “Because of this ‘sweeping power,’ courts are required to give  
 9 ‘great deference’ to the CIA’s assertion that a particular disclosure could reveal intelligence  
 10 sources or methods.” Id. (quoting Sims, 471 U.S. at 169, 179). “The term ‘sources’ is to be  
 11 broadly construed and encompasses not only ‘secret agents,’ but instead reaches all sources of  
 12 information the CIA relies upon, including publicly available information.” Id. (quoting Sims,  
 13 471 U.S. at 170–71). “A foreign government can learn a great deal about the Agency’s activities  
 14 by knowing the public sources of information that interest the Agency.” Sims, 471 U.S. at 176-  
 15 77. Moreover, “superficially innocuous information . . . might enable an observer to discover the  
 16 identity of an intelligence source” by piecing it together with other information. Id. at 178. The  
 17 Ninth Circuit has acknowledged that “there exists ‘a near-blanket FOIA exemption’ for CIA  
 18 records” and that “Sims leaves courts ‘only a short step from exempting all CIA records from  
 19 FOIA.’” Id. (quoting Hunt, 981 F.2d at 1120 (internal quotation marks and alteration omitted)).

20 The CIA and NSA invoke Exemption 3 as to Documents 2 through 15. First, the CIA  
 21 asserts that all of the same information that is exempt from disclosure under Exemption 1 in  
 22 Documents 1-6, 8-9, 11-13 is also exempt under Exemption 3 because it concerns intelligence  
 23 methods and sources. (Blaine Decl. ¶ 48.) Second, the CIA claims that Documents 2-14 contain  
 24

1 code words, pseudonyms, classification, and dissemination control markings that are exempt  
2 from disclosure under Exemption 3. The NSA also invokes Exemption 3 as to Document 8,  
3 asserting that it contains information about intelligence sources and methods and the NSA's  
4 capabilities, functions, and activities.

5 As to Document 1, the Court agrees with the CIA that it has adequately identified  
6 portions of the document that identify methods or source of intelligence that fits within  
7 Exemption 3. On this point, the Court adopts its Exemption 1 analysis. But the Court remains  
8 unconvinced that the CIA has sufficiently identified the intelligence methods and sources in  
9 Documents 2, 3, 4, 5, 6, 8, 9, 11, 12, and 13 to satisfy Exemption 3. The Court reaches the same  
10 conclusion as to the NSA's assertions concerning Document 8. The Court adopts its Exemption 1  
11 analysis as to these documents and the Exemption 3 assertion. In addition, the Court notes that,  
12 as to Exemption, 3 Kiyosaki's Declaration uses the kind of conditional language found  
13 inadequate in the context of Exemption 1 in Wiener. See Hamdan, 797 F.3d at 774. She states  
14 that "the referred material contains information that could potentially reveal NSA capabilities,  
15 sources, and/or methods." (Kiyosaki Decl. ¶ 42.) This undermines her assertion that the redacted  
16 information does actually refer to the NSA's capabilities, sources, and/or methods, and it  
17 deprives Plaintiff of the ability to test the assertion or the Court to intelligently judge the issue.  
18 The Court's in camera review also confirms the inadequacy of the assertion, as it provides too  
19 little guidance to test it.

20 The Court also finds that the CIA has failed to provide sufficient information to allow for  
21 identification of code words, pseudonyms, classifications, and dissemination control markings in  
22 Documents 2 through 14. As to Documents 2-10 and 14, Blaine provides page ranges of  
23 redactions that she claims contain this information. But these same page ranges have been  
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1 identified as containing information about intelligence sources and methods, classification, and  
2 dissemination control markings. Neither the documents themselves (as produced to Plaintiff) nor  
3 the supporting declarations or Vaughn index allow the Court to know whether a particular  
4 redaction concerns an intelligence source or method, a classification mark, a dissemination  
5 control marking, pseudonym, or a code word. Additionally, the Vaughn index asserts that all of  
6 Documents 11-13 contain code words, pseudonyms, disclosure classifications, and dissemination  
7 control markings that justify their withholding. But as the Court previously noted, these  
8 documents total 173 pages and there is no indication from Blaine or the Vaughn index that all of  
9 these documents contain solely this information. The Court's in camera review of these  
10 documents casts further doubt on this assertion. The Court finds the CIA's Vaughn index and  
11 Blaine's Declaration fail to adequately explain what specific portions of the documents truly  
12 identify code words, pseudonyms, disclosure classifications, or dissemination control markings  
13 sufficient to satisfy Exemption 3. Without greater refinement, particularly in the specific  
14 identification of the subject matter of the withholding and specific redactions, the assertion  
15 misses the mark.

16 In sum, the Court concludes that except as to Document 1, the CIA and NSA have failed  
17 to sufficiently support their assertion that all of the withheld materials identified fall within  
18 Exemption 3.

### 19 **3. Segregability**

20 The Court further finds that the CIA and NSA have not adequately justified their  
21 assertion that they have segregated the non-exempt portions of these records.

22 With regard to segregability, "[a] district court must take seriously its role as a check on  
23 agency discretion, but this does not require a page-by-page review of an agency's work."  
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1 Hamdan, 797 F.3d at 779. “Agency affidavits that are sufficiently detailed are presumed to be  
2 made in good faith and may be taken at face value.” Id.

3 The CIA’s segregability assertion fails because “the agency ‘did not provide [plaintiff] or  
4 the district court with specific enough information to determine whether the [agency] had  
5 properly segregated and disclosed factual portions of those documents that the [agency] claimed  
6 were exempt’” under Exemption 1 and 3. Transgender L. Ctr., 46 F.4th at 785–86 (quoting Pac.  
7 Fisheries, Inc. v. United States, 539 F.3d 1143, 1149 (9th Cir. 2008)). Blaine only asserts that  
8 “the CIA conducted a document-by-document and line-by-line review and released all  
9 reasonably segregable, non-exempt information.” (Blaine Decl. ¶ 61.) And the Vaughn index  
10 only makes this assertion as to Documents 11-13. But the CIA provides no details that might  
11 allow the Court and Plaintiff to understand how that line-by-line analysis was performed and  
12 how the CIA made its ultimate conclusion on segregability as to all of the redacted and withheld  
13 documents. There are no document-specific statements, for example, that the materials withheld  
14 are “so inextricably intertwined with the non-exempt portion, that any segregable material would  
15 not be meaningful.” Hamdan, 797 F.3d at 780 (finding such details sufficient to justify a  
16 segregability assertion). The CIA also fails to provide any specific explanation as to why no  
17 portion of the 173 pages withheld in Documents 11-13 can be segregated and produced. The  
18 Court’s in camera review suggests that far greater specificity is necessary to justify the lack of  
19 segregation of these three documents. See Hamdan, 797 F.3d at 780 (noting that the district court  
20 may undertake an in camera review where “an agency declaration lacks sufficient detail”).  
21 Ultimately, as to all of the documents except Document 1, the Court lacks sufficient information  
22 to determine whether any exempt information can be segregated from non-exempt information.  
23 See id. (noting that “the DIA’s declarations lack sufficient detail to allow the district court to  
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1 determine that the claimed exemptions apply throughout all of the documents,” undermining any  
2 segregability assertion). Defendants have failed to satisfy their burden as to segregability.

3 **C. Remedy**

4 Except as to Document 1, the Court finds that the CIA and NSA have failed to meet their  
5 burden to justify the withholding of information from Documents 2 through 15 and as to the  
6 issue of segregability for those same documents. The Court must therefore determine the proper  
7 remedy.

8 Ninth Circuit precedent suggests that the agencies here should be given further  
9 opportunity to supplement the Vaughn index and supporting declarations to support the claimed  
10 FOIA exemptions and segregability. See Wiener, 943 F.3d at 979 (noting that revision of the  
11 Vaughn index on remand was appropriate given the FBI’s failure to adequately support the  
12 claimed exemptions); Transgender L. Ctr., 46 F.4th at 782 (remanding “to the district court to  
13 direct the agencies to provide specific, non-conclusory Vaughn indices” where the originals  
14 failed to suffice). Because the Court has already undertaken in camera review of the documents,  
15 the Court is tempted by rule on the existing record. But as the Court in Wiener made clear, a  
16 final ruling based on an “in camera review is appropriate only after ‘the government has  
17 submitted as detailed public affidavits and testimony as possible.’” Wiener, 943 F.2d at 979.  
18 Here, the CIA “respectfully asks for this Court’s leave to provide” further information to justify  
19 its “FOIA Exemption assertions.” (Reply at 12 n.14.) Given that the CIA believes it can provide  
20 more specific information, the Court allows this further opportunity.

21 The Court therefore ORDERS Defendants to file a supplemental Vaughn index and any  
22 additional supporting declarations they believe address the gaps identified in this Order.  
23 Defendants should consider adding far more specificity in the Vaughn index, including  
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1 explanations tailored to each redacted portion of the documents presented, and greater specificity  
2 as to the documents withheld in full. Defendants should also consider providing more specific  
3 and clear explanations as to how the revelation of this dated information could be reasonably be  
4 expected to harm the national security today. Defendants must file the supplemental Vaughn  
5 index and supporting declarations within thirty days of entry of this Order. The Court further  
6 ORDERS Defendants to file a brief of no more than twelve pages explaining why the additional  
7 materials satisfy Defendants' burden as to Exemptions 1 and 3 and segregability. Defendants are  
8 encouraged to brief the question of whether the agencies may redact or withhold portions of  
9 documents that are not responsive to Plaintiff's FOIA requests. The brief must be filed within  
10 thirty days of entry of this Order. Plaintiff's opposition brief of no more than twelve pages shall  
11 be due fourteen days after Defendants file their brief. Defendants may then file a reply of no  
12 more than six pages due seven days after the deadline for Plaintiff's opposition. The Court will  
13 then rule on what records or portions thereof, if any, are properly withheld and what must be  
14 released.

### 15 CONCLUSION

16 The Court has carefully reviewed Defendants' invocation of FOIA Exemptions 1 and 3 to  
17 withhold materials from portions of Documents 1-9, 14-15 and all of Documents 11-13. Except  
18 as to Document 1, the Court finds that Defendants have not met their burden to justify  
19 application of Exemptions 1 or 3 to withhold the information. And Defendants have not provided  
20 adequate detail to satisfy the Court that they have undertaken an adequate segregability analysis.  
21 The Court's in camera review confirms the inadequacies of the Vaughn index and supporting  
22 materials. But the Court finds that Defendants should be given one additional opportunity to  
23 address the Court's concerns. The Court will rule definitively on the FOIA claims after  
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1 Defendants supplement the record and the Parties complete their supplemental briefing as  
2 specified in this Order.

3 The clerk is ordered to provide copies of this order to all counsel.

4 Dated November 4, 2022.

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6 Marsha J. Pechman  
7 United States Senior District Judge  
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